Supreme Court, U.S.
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No. 84-2020

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PURSUE ENERGY CORPORATION, ALMEADIE BERRY, CARL ERSKINE BERRY and SHELBY JEAN BERRY,
Petitioners

v.

CLARENCE WILBERT BERRY,
Respondent

On Petition for Writ of Certiorari to the Supreme Court of the State of Mississippi

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent accepts the "Questions Presented" save for the proposition that the statute purports to change "without limit" the laws of descent and distribution. This action involves a statute providing a limited three-year time frame in which illegitimates are allowed to bring actions to establish their right to inherit from their natural father.

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BRIEF IN OPPOSITION

JURISDICTION

The decision by the State Supreme Court in this matter remanded the case to the trial court for a full trial on the merits. A remand decision of this nature is not appealable. *O'Dell v. Espinosa*, 456 U.S. 430 (1982). R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE, § 3.12 (5th Ed. 1978).

STATEMENT OF THE CASE

Respondent accepts the statement of facts as set forth in the Petition with the following reservations. Respondent intends to show on remand that not only were the vast majority of interests claimed by Pursue Energy

Corporation carved out after *Trimble v. Gordon*, 430 U.S. 762 (1977), but also that any minimal investigation by Petitioners regarding those having rights and claims of inheritance to the intestate estate of Shelby Berry would have disclosed Respondent's identity, right and claim. Not only was it well known in the community that Appellant was Shelby Berry's natural son, but the father acknowledged that fact generally [1] and specifically acknowledged it formally on the public record of Appellant's birth certificate. Respondent would also show on remand that neither Almeadie Berry nor Carl Erskine Berry were entitled to inherit upon the death of Shelby Berry.

ARGUMENT

The passage of MISS. CODE ANN. § 91-1-15 (Supp. 1984) marked a modest attempt by the Mississippi Legislature to ameliorate the savage effects of past laws controlling the rights of illegitimates to inherit. This statute opened a discreet window which allowed previous victims of invidious discrimination some small measure of redress for the effective deprivation of their right to inherit fostered by prior state law. The statute provides a remedy designed to allow those who have been previously disinherited an opportunity to establish a claim and possibly recoup a part of the losses imposed upon them by a long standing, unconstitutional statutory scheme.

Petitioners' reasons for granting the writ are specious at best. First, Petitioners characterize the statute in question as an "overzealous attempt to enhance the inheritance rights of illegitimate citizens." [2] To the knowledge of Respondent, this is the first time in this Court's his-

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[1] Complaint, para. V, p. 2, filed October 14, 1982. Admitted by Appellees' motion to dismiss in the nature of demurrer.

[2] Accord C. Bloch, *Property Rights—Are There Any?*, 42 N.C.L. REV. 136 (1963) (arguing that judicial and legislative activity expanding rights available to blacks unconstitutionally infringes property and contractual rights.)

tory that counsel has accused the Mississippi Legislature of engaging in overzealous activity to protect the rights of disenfranchised minorities, whether they be racial or, as in this case, illegitimates. In any event, the purpose of the legislation is not to "enhance" any right of illegitimates. The statute simply restores rights inherently belonging to any child, but long denied to children born out of wedlock.

Petitioners would also attempt to paint a picture of state courts clogged to overflowing with cases filed under the provisions of MISS. CODE ANN. § 91-1-15. This contention is not supported with any actual figures, even if such figures would be relevant. In point of fact, the savings clause in the statute was designed to offer only a limited opportunity to actual victims of past discrimination to bring an action to establish their right to inherit. The window offered by this legislation has *now closed* and no more cases of this nature may be commenced.

Petitioners would argue that the retroactive application of the statute serves to divest them of property without just compensation, deprives them of property without due process of law and, in some way, impairs contractual undertakings. Yet, at this point in time, no rights of Petitioners have been infringed, i.e., the lower court's remand *only* validates a cause of action granted by the legislature. However, even if Section 91-1-15 did affect property rights of Petitioners in some way, these rights could hardly be considered as paramount to the constitutional liberties which have been denied to Respondent's class in the past and which the statute makes a token effort to restore. Neither property rights nor contract rights are absolute and both must give way when faced with the need to enforce countervailing constitutional liberties. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-85 (1980). The violation of Respondent's constitutional rights at the time of his father's death cannot be nullified by the Petitioners' raising the shib-

boleth of "property rights" as an offsetting consideration.[3]

Petitioners' due process argument is likewise fatally defective. The courts have never denied the inherent power of the legislature to readjust the burdens and rights of its citizens. The burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Petitioners not only failed to show the acts of the Mississippi Legislature in passing this legislation to be either irrational or arbitrary,[4] they also failed to establish that Section 91-1-15 mandates a taking of Petitioners' property.

The salient fact in all of this is that the application of the statute does not work any divestiture of property. The statute merely revokes legislatively imposed barriers to the exercise of rights due any child with regard to his parents' property and allows the illegitimate to establish his right to inherit. Once the right to inherit is established, the distribution of property will be made according to other laws of the state to include the laws of descent and distribution, laws concerning bona fide purchasers for value, doctrines of estoppel and laches and on general equitable principles. All of the above must be

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[3] Petitioners' invocation of the contract clause falls under the same ax as their arguments concerning an unconstitutional "taking." Even if the trial court determines that a redistribution of property is mandated by Section 91-1-15, under the low level of scrutiny traditionally provided such legislation Section 91-1-15 easily passes muster. See e.g., Energy Reserves Group v. Kansas Power & Light Co., 459 U.S. 400 (1983); Exxon Corp. v. Eagerton, 462 U.S. 176 1983).

[4] Williamson v. Lee Optical, 348 U.S. 483, 488 (1955), requires only that "there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

passed upon by the state trial court if, and only if, the Respondent's right to inherit is properly established.

The controlling consideration is not that Section 91-1-15 gives illegitimates rights, but rather the statute restores rights which were inherently theirs, and which have long been denied them. The legislatures and courts have full discretion to mold a remedy that will address the deprivations suffered by Respondent and others within his class. Legislative bodies are empowered to pass laws to help ameliorate the effects of past discrimination. C.f. *Firefighters Local Union No. 1784 v. Stotts*, 476 U.S. —, 81 L.Ed.2d 483 (1984).[5] The limited retrospective application of Section 91-1-15 is fully justified as a legitimate exercise of the legislature's and court's inherent power to correct past discriminatory practices.[6] In fact, this Court had the full power and prerogative to make *Trimble* fully retroactive had it so desired.[7] The Mississippi Legislature, rather than vest illegitimates with full retroactive rights under *Trimble*, embarked upon a much more modest scheme to allow illegitimates an opportunity, for a limited period of time, to establish their rights to inherit from their father.

Even more important, Petitioners are unable to point to any case law relating to substantive due process or the impairment of contracts which: (1) places the decision below in conflict with any decision of this Court; or

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[5] See also, Califano v. Webster, 430 U.S. 313 (1977) (important governmental interest test used to validate statute compensating for past discrimination against females.)

[6] Petitioners would have this Court believe that no court has applied the principles espoused in Trimble retroactively. This is not the case. See Succession of Viola Alexander Clivens, Slip Op., S.Ct. of La., No. 82-C-0125. (Jan. 10, 1983)

[7] With respect to the retroactivity of judicial dscisions, see Chevron Oil Co. v. Huson, 404 U.S. 97, 107 (1971) (establishing a three-part test including resolution of the issue of whether retroactivity will further the purpose of a new rule or holding).

(2) presents any conflict with other state courts or with courts of appeal on this issue. Sup. Ct. R. 17.1.[8]

CONCLUSION

For the foregoing reasons, this Petition For Certiorari should be denied.

Respectfully submitted,

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[8] In an attempt to meet the requirements of Supreme Court Rule 17.1, Petitioners cite one case from a lower New York state court. What Petitioners fail to note is that this case is based upon a New York statute which does not facially purport to be retroactive in application.